(1) Supreme Court, U.S.
FILED

No. 95-[redacted]89 JUL 6 1995

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

WALTER F. JEKOT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

PETER GOLDBERGER
Counsel of Record
JAMES H. FELDMAN, JR.
PAMELA A. WILK
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200

Attorneys for Petitioner

July 1995

130pp

QUESTIONS PRESENTED

1. Where a federal criminal defendant pleads guilty to a count charging conspiracy under 18 U.S.C. § 371, encompassing differing criminal objectives over a six year period, only one of which the defendant admits, may the court sentence under the Sentencing Reform Act and Guidelines without finding (or having a factual basis to find): (i) that a single conspiracy continued throughout the period, and thus after November 1, 1987; or (ii) that the defendant agreed with any other person to achieve any objective other than that which he admitted?

2. Under the United States Sentencing Guidelines, where a conspiracy to defraud the Food and Drug Administration, and to commit related offenses involved no imposition of pecuniary loss on any victim, was the Ninth Circuit wrong to uphold an increase in offense level under USSG § 2F1.1(b)(1) (fraud "loss") by the dollar value of the substances distributed, when the Fourth and Seventh Circuits permit no such increase?

TABLE OF CONTENTS*

QUESTIONS PRESENTED i

LIST OF ALL PARTIES iii

INDEX TO APPENDIX iv

TABLE OF AUTHORITIES v

PETITION

OPINIONS BELOW 1

JURISDICTION 2

STATUTES AND RULES INVOLVED 3

STATEMENT OF THE CASE 8

a. Course of Proceedings 8
b. Statement of Facts 17
c. Lower Court Jurisdiction . . . 19

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with this Court's cases concerning how to determine whether there is a single conspiracy under 18 U.S.C. § 371, or more than one, and presents that problem in the novel and important context of guideline sentencing and a partial-Alford plea. 20

---

*

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Walter F. Jekot, M.D., and the United States).

2. The decision below conflicts with recent rulings in two other circuits that no enhancement under USSG § 2F1.1(b)(1) for dollar "loss" should be added to the base offense level in a case involving fraud against the FDA, where no person was subjected to pecuniary losses. 35

CONCLUSION 40

INDEX TO APPENDIX

A. Memorandum of the Court of Appeals

B. Sentencing Memorandum of the District Court

C. Order of Court of Appeals amending opinion and denying rehearing

D. Order denying stay or recall of mandate

TABLE OF AUTHORITIES

CASES

Blumenthal v. United States,
332 U.S. 539 (1947) 30

Braverman v. United States,
317 U.S. 49 (1942) 26, 30

Braxton v. United States,
500 U.S. 344 (1991) 37

Dennis v. United States,
384 U.S. 855 (1966) 27

Felix v. United States,
503 U.S. --, 112 S.Ct. 1377,
118 L.Ed.2d 25 (1992) 32

Fiswick v. United States,
329 U.S. 211 (1946) 29

Grunewald v. United States,
352 U.S. 866 (1957) 28

Haas v. Henkel, 216 U.S. 462 (1910) .. 27

Hammerschmidt v. United States,
265 U.S. 182 (1924) 27

Kotteakos v. United States,
328 U.S. 750 (1946) 30

McNally v. United States,
483 U.S. 350 (1987) 35

Mistretta v. United States,
488 U.S. 361 (1989) 23

North Carolina v. Alford,
400 U.S. 25 (1970) 26

Nye & Nissen Corp. v. United States,
336 U.S. 613 (1949) 15, 29

Pinkerton v. United States,
328 U.S. 640 (1946) 32

Santobello v. New York,
404 U.S. 257 (1971) 25

Tanner v. United States,
483 U.S. 107 (1987) 27

United States v. Andersen,
45 F.3d 217 (7th Cir. 1995) 37

United States v. Broce,
488 U.S. 563 (1989) 24

United States v. Cambra,
933 F.2d 752 (9th Cir. 1991) 38

United States v. Chatterji,
46 F.3d 1336 (4th Cir. 1995) .. 37-39

United States v. Haddock,
12 F.3d 950 (10th Cir. 1993) 39

United States v. Miller,
471 U.S. 130 (1985) 22

Yates v. United States,
354 U.S. 298 (1957) 28

STATUTES AND RULES:

18 U.S.C. § 371 ..... 9, 13, 26, 28
18 U.S.C. § 545 ..... 9, 11, 28
18 U.S.C. § 3231 19
18 U.S.C. § 3742 19

21 U.S.C. § 321(p) 11
21 U.S.C. § 331 ..... 9, 10, 11
21 U.S.C. § 333 ..... 9, 10, 15, 21
21 U.S.C. § 333a 11
21 U.S.C. § 353(b) 15
21 U.S.C. § 853 11

28 U.S.C. § 1254(1).....2
28 U.S.C. § 1291.....19

Fed.R.App.P. 4(b) 19

Fed.R.Crim.P. 11(f) 25

Fed.R.Crim.P. 32(c)(1) (1994 rev.) ... 22
Fed.R.Crim.P. 32(c)(3)(D) (1983 rev.) 22

S.Ct. Rule 13.1, 13.4 2
S.Ct. Rule 14.1(i) 19

United States Sentencing Guidelines:
§ 2B1.1, appl. note 5 39
§ 2B1.2(a) 16
§ 2F1.1 36
§ 2F1.1(b)(1) 36-39

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WALTER F. JEKOT respectfully petitions this Court for a writ of certiorari to review the judgment and memorandum of the United States Court of Appeals for the Ninth Circuit entered on February 24, 1995, affirming his conviction and 60-month sentence, entered in the Central District of California for conspiracy to violate federal statutes regulating the prescription of steroids by physicians.

OPINIONS BELOW

The Memorandum of the United States Court of Appeals for the Ninth Circuit on direct appeal, filed on February 24, 1995, is not published. It is Appendix A to this petition. Corrections to the memorandum were issued in connection with

the denial of rehearing. App. C. There is no published opinion of the District Court. The trial court's Sentencing Memorandum (John G. Davies, U.S.D.J.), dated and filed September 30, 1995, is Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit, affirming petitioner's conviction and sentence, was entered on February 24, 1995. On April 7, 1995, the court of appeals denied his petition for rehearing with suggestion for rehearing in banc. App. C. This petition is filed within 90 days of that date. Rule 13.1, 13.4. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Title 18, U.S. Code, provides, in pertinent part:

> **§ 371. Conspiracy to commit offense or to defraud United States**
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
>
> **§ 545. Smuggling goods into the United States**
>
> * * * *
>
> Whoever fraudulently or knowingly ... receives, conceals, buys, [or] sells, ... such merchandise [i.e. (as stated in the previous clause), "any merchandise" imported or brought "into the United States ... contrary to law"] after importation, knowing the same to have been imported or brought into the United States contrary to law --

Shall be fined under this title or imprisoned not more than five years, or both.

* * * *

The Food, Drug, and Cosmetic Act ("FDCA"), as codified in Title 21, U.S. Code, provides, in pertinent part:

§ 331. Prohibited acts

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

* * * *

§ 333. Penalties

(a) Violation of 21 USC § 331. Any person who violates a provision of section 301 [of the FDCA, 21 U.S.C. § 331] shall be imprisoned for not more than one year or fined ..., or both.

(b) Second offense; intent to defraud or mislead. Notwithstanding the provisions of subsection (a) of this section, if any person ... commits such a violation with the intent to defraud or mislead, such person

shall be imprisoned for not more than three years or fined ..., or both.

§ 353. Exemption in case of drugs and devices

* * * *

(b) Prescription by physician; exemption from labeling and prescription requirements; misbranded drugs; .... (1) A drug intended for use by man which --

* * * *

(B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe to use except under the supervision of a practitioner licensed by law to administer such drug; ...

* * * *

shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, ... The act of dispensing a drug contrary to the provisions of

---

** Redesignated in 1988 as § 333(a)(2).

this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

The United States Sentencing Guidelines provide, in pertinent part:

> **§ 2F1.1. Fraud and Deceit; Forgery ...**
>
> (a) Base Offense Level: 6
>
> (b) Specific Offense Characteristics
>
> (1) If the loss exceeded $2,000, increase the offense level as follows:
> ....
>
> Commentary
>
> Application Notes:
>
> * * * *
>
> 10. In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:
>
> (a) a primary objective of the fraud was non-monetary; or the fraud caused or risked reasonably foreseeable,

substantial non-monetary harm;

* * * *

13. ... In certain ... cases, ... relatively broad statutes[] are used primarily as jurisdictional bases for the prosecution of other offenses. ... Where the indictment or information setting forth the count of conviction (or a stipulation as described in § 1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than § 2F1.1. Otherwise, in such cases, § 2F1.1 is to be applied, but a departure from the guidelines may be considered.

§ 2X1.1. Attempt ... or Conspiracy (Not Covered by a Specific Offense Guideline)

(a) Base Offense Level: The base offense level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty.

STATEMENT OF THE CASE

This petition arises out of a conviction and 60-month guideline sentence, after a guilty plea to one count of an indictment charging a medical doctor with conspiracy to violate federal statutes regulating the prescription of anabolic steroids.

a. The Course of Proceedings

A 28-count indictment filed in October 1991 in the United States District Court for the Central District of California charged that petitioner Walter F. Jekot, M.D., a practicing Los Angeles physician, committed various federal offenses relating to the dispensation of anabolic steroids and human growth hormone. Specifically, Count One charged that the Dr. Jekot conspired with unspecified persons in violation of 18

U.S.C. § 371, from about 1985 through February 1991.

The conspiracy was alleged to have had five objectives: (a) to defraud the U.S. Food and Drug Administration (FDA) by impairing, impeding and defeating its effort to regulate and control the manufacture and distribution of steroids and human growth hormone; (b) to violate id. § 545 by fraudulently receiving, buying, selling, and concealing drugs that he knew had been brought into the United States contrary to law; (c) to violate 21 U.S.C. §§ 331(a) and 333(a)(2) (formerly § 333(b)), by introducing into interstate commerce, with intent to defraud and mislead, drugs that were "misbranded" for lack of a prescription; (d) to violate 21 U.S.C. § 333(e)(1) by knowingly distributing (after November 1988) anabolic steroids other than for the treatment of

disease pursuant to the order of physician; and (e) to violate id. § 331(d) by causing the introduction into commerce, with intent to defraud and mislead, drugs that were unapproved "new drugs," or that were manufactured by or received from "black market" sources.

Counts Two through 23 charged particular distributions of steroids in 1989 and 1990, in violation of 21 U.S.C. § 333(e); Count 24, possession with intent to distribute steroids, on August 17, 1990, in violation of § 333(e)[1]; Count 25 and 26, distribution of steroids other than for the treatment of disease, in May and July, 1990, in violation of § 333(e); Count 27, receipt of smuggled

---

[1] August 17, 1990, is the date when petitioner's offices and home were searched under warrants, and grand jury subpoenas were served. He was not indicted until about a year later.

steroids on August 17, 1990, in that the particular substance was a "new drug" under 21 U.S.C. § 321(p) and not approved by the FDA for import, in violation of 18 U.S.C. § 545; and Count 28, criminal forfeiture, under 21 U.S.C. § 333a.[2]

After litigation of several pretrial motions, petitioner entered a negotiated plea of guilty to Count One of the indictment. In exchange, the government agreed to move for dismissal of all the other counts. In connection with the plea, petitioner made only highly limited admissions, focused solely on his purchases of smuggled steroids in 1985 and

---

[2] Section § 333a, in effect only from 1988 through 1990, made the criminal forfeiture provisions of the Controlled Substances Act, 21 U.S.C. § 853, applicable to violations of 21 U.S.C. § 331(e) involving steroids. Compare Appx. B42-B44 (giving precise effective dates, but misreading § 333a as defining an offense).

1986. Under the agreement, however, the government reserved the "right ... to present additional facts to the court at the time of sentencing." The petitioner acknowledged in the agreement:

> that the district court will not be limited in setting sentence to those specific facts to which Jekot admits in his plea of guilty. Jekot agrees that he is pleading guilty to Count One of the indictment, and agrees that the district court may consider as relevant conduct (if the court determines this is appropriate after hearing on the matter) facts pertaining to all aspects of the conspiracy as charged for the purposes of (1) determining whether the Sentencing Guidelines are applicable, (2) determining the applicable sentencing guideline, and (3) determining the appropriate sentence. Jekot also agrees that the district court may consider all relevant conduct in determining Jekot's sentence ..., insofar as permitted by law. ... Jekot denies the objectives of the conspiracy not admitted to in the attached Factual Basis.

On June 1, 1992, the district court accepted the plea under this agreement.

Following preparation of an unusually lengthy Pre-Sentence Investigation Report ("PSI"), and the filing of objections and briefs, the district court held three days of evidentiary hearings on the factual issues in August and September 1993. Following these hearings, the court found that the charged conspiracy had continued past November 1, 1987, and that it encompassed all the charged objectives. The court therefore determined that the Sentencing Reform Act applied and that the fraud guideline, USSG § 2F1.1, would determine the sentence.

Accordingly, on September 30, 1993, petitioner was sentenced to serve 60 months' imprisonment (the statutory maximum under 18 U.S.C. § 371, because

that was less than the court determined as the otherwise-applicable guideline range; see USSG § 5G1.1(a)), to be followed by three years' supervised release. The court imposed no fine. That day, the court filed a 34-page Sentencing Memorandum containing its findings and justifying the sentence. App. B.

Following entry of judgment, petitioner appealed his sentence to the Ninth Circuit. Over objection, the district court granted bail pending appeal.

On February 24, 1995, in a not-for-publication memorandum, the panel (Schroeder, Fletcher & Thompson, JJ.) affirmed. App. A. The court upheld the ruling that "Jekot's conspiracy continued until February 1991" on the basis that "Jekot continued to commit overt acts in furtherance of the conspiracy until" that

time. App. A3-A4. The court detected no clear error in the finding that:

> Jekot distributed steroids in violation of 21 U.S.C. § 333(e) ... as part of the same conspiracy that continued until February 1991. The government may charge "certain types of fraudulent practices ocurr[ing] at one period and other types at different periods" as a single conspiracy. Nye & Nissen v. United States, 336 U.S. 613, 617 (1949). Moreover, because Jekot committed overt acts in furtherance of the conspiracy after section 333(e) was enacted, his conspiracy was properly held to violate section 333(e) even though the statute was enacted after the inception of the conspiracy.

App. A5-A6. The court of appeals refused to rule upon petitioner's challenge to the district court's application to him of 21 U.S.C. § 353(b), on the basis that the same sentencing guideline and the same sentence would have applied in any event. Finally, the court ruled that the fraud guideline was "most applicable to

the offense of conviction," USSG § 2B1.2(a), "because Jekot pleaded guilty to a conspiracy count which included allegations of fraud." App. A8.

Petitioner's request for rehearing was denied, as was the government motion to amend the memorandum, although the court of appeals did amend the memorandum essentially as requested by the government. App. C. A motion for stay or recall of mandate was refused, App. D, and the district court declined to continue bail pending certiorari. The court did allow voluntary surrender as of a date later than this petition is due for filing, thus allowing for the possibility of reconsideration of bail prior to surrender.

b. Statement of Facts

In the course of his practice as a medical doctor in Los Angeles, between 1985 and 1991, petitioner Walter F. Jekot, M.D., prescribed and provided anabolic steroids and human growth hormone to many of his patients. He admitted that on several occasions in 1985 and 1986 he knowingly purchased smuggled steroids for dispensation to his patients. The government claimed that petitioner's distribution of steroids was outside of any legitimate medical practice, and was for such purposes as muscle enhancement in bodybuilders.

The facts are set forth in detail in the PSI ¶¶ 69-186, at 15-44, which the district court adopted. App. B26. The district court found that petitioner's conduct involved various forms of fraud,

App. B52, and entailed a conscious or reckless risk of serious bodily injury to the individuals who consumed these substances. App. B59. The court enhanced the base offense level by a measure of "loss," equated with the "street value" of the substances sold to petitioner's patients. App. B53-56.[3] Nowhere in that lengthy statement, nor anywhere else in the record, are facts set forth to show that the petitioner agreed with other persons, who shared his guilty knowledge and intent, to accomplish the varied objectives of the alleged conspiracy, nor to show that any conspiracy -- as

---

[3] In this regard, the district court added 8 levels to the base level of 6, predicated on a "loss" of over $200,000. App. B66. The probation officer had recommended 11 levels. App. B11. This is the only material variation between the sentencing court's calculations and those presented in the PSI.

contrasted with his own individual acts -- continued after November 1, 1987.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(i). The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses. The jurisdiction of the court below rested upon 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and was timely invoked by Notice of Appeal filed within ten days of the entry of the judgment of sentence. Fed.R.App.P. 4(b).

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with this Court's cases concerning how to determine whether there is a single conspiracy under 18 U.S.C. § 371, or more than one, and presents that problem in the novel and important context of guideline sentencing and a partial-Alford plea.

In the written plea agreement and at the plea hearing, petitioner Jekot admitted conspiring in 1985-1986 to receive and sell smuggled steroids, but he denied that the conspiracy encompassed any of the other objectives alleged in Count One. On the basis of district court findings that petitioner committed overt acts after the effective date of the Sentencing Reform Act, and that he committed the substantive offenses charged in the dismissed counts, the court below upheld a guideline sentence based on a theory of continuing conspiracy to commit those other

offenses, notwithstanding petitioner's much more limited admissions. All the alleged conspiratorial objectives had the common feature of being part of petitioner's own ongoing dispensation of steroids in his medical practice, but the facts as set forth at the plea and in connection with sentencing did not establish, nor did the district court ever find, either that there was any conspiracy to commit these divergent offenses, or that the conspiracy which petitioner admitted continued after November 1, 1987, the effective date of the guideline sentencing system.

The lower courts' failure to recognize the necessity of such a finding in order to support a judgment for the full scope of the Count One offense as charged,[4] and thus to support a

guidelines sentence, places its ruling at odds with this Court's cases dealing with the problem of single and multiple conspiracies.[5] Because this case

---

[4] As the lower courts recognized, however, his plea as tendered did support petitioner's conviction under Count One, because they described a conspiracy fairly and fully included within that described in the count. See United States v. Miller, 471 U.S. 130 (1985) (no impermissible variance from conviction on facts of lesser scope but fully included within those charged, where broader allegations withdrawn from jury's consideration).

[5] The failure to make these essential findings, despite petitioner's clear objection, also violated Fed.R.Crim.P. 32(c)(3)(D) (1983 rev.) (since recodified at Rule 32(c)(1) (1994 rev.)). As noted in the statement of the case above, the court of appeals purported summarily to affirm the required finding: "The district court's finding that Jekot's conspiracy continued until February 1991 ... is not clearly erroneous. ... The district court found that Jekot distributed steroids in violation of 21 U.S.C. § 333(e) as part of the same conspiracy that continued until February 1991." App. A3-4, A5 (emphasis added). In reality, there are no such findings in the district court record. See generally Appendix B.

presents that issue in a context which is critical to the new realities of federal criminal practice -- guilty pleas under the sentencing guidelines -- the Court should grant certiorari and provide guidance to the lower courts.

In this case, the existence vel non of a single conspiracy was crucial, since unless the same conspiracy to which petitioner pleaded guilty continued past November 1, 1987, the case was not subject to sentencing under the Sentencing Reform Act and guidelines. See Mistretta v. United States, 488 U.S. 361 (1989). It may be that all the conduct in which the lower courts found petitioner engaged after 1987 had the common objective, in petitioner's mind, of distribution of anabolic steroids and human growth hormone without regard to legal restrictions. But that would not

justify a conclusion that there was a continuing conspiracy to commit the charged object offenses, because there was no evidence presented, much less any finding made, of continuity or commonality of knowing and intentional agreement or involvement by others in these various actions. Without such agreement and shared intent, of course, there can be no conspiracy.

Ordinarily, the conviction that results from a guilty plea, and thus the ensuing sentence, is based on a defendant's admissions in connection with tendering the guilty plea. The plea itself constitutes a sufficient basis for the court to enter a conviction for the charged offense. United States v. Broce, 488 U.S. 563, 570-71 (1989). Here, that offense is conspiracy, and issues concerning the scope and extent of that

conspiracy were not resolved by the plea itself. Rule 11(f) of the Federal Rules of Criminal Procedure requires that the judge not sentence[6] "unless it is satisfied that there is a factual basis for the plea."

Thus, as the plea agreement in this case acknowledges, where the defendant does not admit all the conduct necessary to establish the full scope of the offense on which sentence is to be predicated (and even if he admits none of the conduct), the plea is not per se invalidated, but the court must then find

---

[6] The rule literally says, "should not enter a judment upon such plea ...." Fed.R.Crim.P. 11(f). In Santobello v. New York, 404 U.S. 257, 261 (1971), this Court described the finding of a factual basis as mandatory, and in 1974, when Rule 11(f) was revised, the Advisory Committee's note made clear that this duty is not optional, despite the term "should."

a factual basis elsewhere. See North Carolina v. Alford, 400 U.S. 25 (1970). In a case like this, where the defendant's admissions at the time of the plea do make out all the elements of an offense under the charged statute (18 U.S.C. § 371), the problem arises not with respect to the validity of the plea, as in Alford, but with respect to sentencing. That is because of issues concerning whether the federal sentencing guidelines apply, and how a proper sentence is to be calculated under those guidelines if they do apply.

The essence of any conspiracy is the agreement. Under § 371, a conspiratorial agreement may properly be charged, as in Count One of petitioner's indictment, as a single offense encompassing multiple criminal objectives. Braverman v. United States, 317 U.S. 49, 52-54 (1942). One

of the objectives alleged in Count One that petitioner did not directly admit was to defraud the United States Food and Drug Administration (FDA) by seeking to defeat and impair its proper function in regulating the importation and distribution of steroids[7]; the other objectives involved specific violations of particular statutes (one of which was not enacted until November 1988). The plea agreement and petitioner's admissions afforded a basis for finding that petitioner agreed in 1985 and 1986 with individuals by the names of Insko (who in 1989 returned to petitioner's office as a government informant) and Artino to obtain smuggled, black market steroids.

---

[7] See Tanner v. United States, 483 U.S. 107 (1987); Dennis v. United States, 384 U.S. 855, 861 (1966); Hammerschmidt v. United States, 265 U.S. 182, 188 (1924); Haas v. Henkel, 216 U.S. 462, 479 (1910).

Petitioner admitted that this conduct established a conspiracy under § 371 to violate 18 U.S.C. § 545, among himself, Artino, and Insko. The same admissions implicitly established a conspiracy to defraud the FDA, which continued (albeit barely) to a time within the five year statute of limitations. See Yates v. United States, 354 U.S. 298, 333-334 (1957); Grunewald v. United States, 352 U.S. 866 (1957).

There was no factual basis proffered, and none found, to believe that the Jekot-Artino conspiracy, or the Jekot-Insko conspiracy, or the Jekot-Artino-Insko conspiracy, if there was one, existed in any form after 1986. Petitioner's objective of defrauding the FDA might be said to have continued throughout the 1985-1991 period and served to unify a conspiracy, despite

different means of carrying out that overriding goal, if there were a factual basis to find an agreement that continued. But there was no continuity of membership (even without a strict identity of members, as might exist where one person replaces another in a conspiratorial group) sharing the required knowledge and specific intent. A "'continuous co-operation of the conspirators to keep it up' is necessary" to have a single conspiracy. Fiswick v. United States, 329 U.S. 211, 216 (1946); see Nye & Nissen Corp. v. United States, 336 U.S. 613, 617 (1949) (finding unitary conspiracy to defraud government agency by various means, involving same people over period of time). The questions whether there was one conspiracy or more, and whether any agreement encompassing the unadmitted objectives at a later time

constituted the same conspiracy as that which petitioner admitted, were the critical underlying questions of fact for sentencing purposes in this case. See Braverman, supra. Yet these questions were ignored.

The lower courts found that petitioner's own conduct continued, in various forms, during the entire period, but that fact alone cannot make out a single conspiracy, even if his conduct, at various times, involved various others. See also Blumenthal v. United States, 332 U.S. 539 (1947); Kotteakos v. United States, 328 U.S. 750 (1946). The record of this case is devoid of any finding -- or of any basis for any court to find -- that any one illicit agreement existed and continued, bridging the periods before and after November 1,

1987.[8] The absence of any such finding

---

[8] In connection with its finding that the defendant was subject to a guideline sentencing enhancement for "role in the offense," USSG § 3B1.1, the district court adopted the PSI's finding that "Jekot's scheme involved at least five other participants within the meaning of Guideline 3B1.1(a)." App. B60. The meaning of "participant" under that guideline includes the requirement that the person be "criminally responsible," whether or not charged. Id., appl. note 1. This is as close as the district court got to a finding of other members in the alleged conspiracy. The referenced paragraphs of the PSI contain no finding on membership in a single conspiracy, however, only mention of Artino, Insko, and two other individuals (Vorhees and Goglia) who at differing, later times may have knowingly participated with the petitioner in "criminal conduct." In addition to these, the PSI throws in unnamed "individuals affiliated with the defendant's black market connection with the Mexican pharmacy through which Jekot obtained smuggled shipments of anabolic steroids" and those "to whom the defendant supplied the smuggled anabolic steroids and diverted HGH." Nothing was said of those persons' guilty knowledge or criminal intent, however, much less that they were participants in the overall, unitary conspiracy alleged in the indictment.

is fatal to the guideline sentence imposed.

The lower courts' entire sentencing theory in this case is based on a failure to recognize that one person's commission of a substantive crime, or a series of such crimes, even if some of those crimes are carried out in conjunction with others, is fundamentally different from the separate offense of conspiracy. Felix v. United States, 503 U.S. --, 112 S.Ct. 1377, 118 L.Ed.2d 25 (1992); Pinkerton v. United States, 328 U.S. 640, 643-44 (1946). The district court's opinion, App. B, discussing petitioner's "liability" for various substantive offenses without regard to the agreement and shared intent elements of conspiracy, is permeated with this error.

Under the plea agreement, petitioner acknowledged that he might be sentenced

under the Sentencing Reform Act and guidelines if the district court found, as a matter of fact, that the sole offense to which he pleaded guilty -- that is, the conspiracy charged in Count One -- existed and continued after November 1, 1987. But the post-November-1987 offense found had to be the same offense, that is, the same conspiracy, as that to which he pleaded. Only then could the guidelines, and thus the "relevant conduct" aspect of the plea agreement, come into play.[9]

---

[9] In omitting this critical step, the courts below appear to have overlooked this distinction. Its significance is illustrated, however, in this Court's recent decision in Witte v. United States, ___ U.S. --, 63 U.S.L.W. 4576 (June 14, 1995), where subsequent conspiratorial drug activity that had been held to qualify as "relevant conduct" for sentencing purposes (as part of the same course of conduct") was the subject of a separate prosecution because it allegedly involved a different

Because the lower courts in this case neither looked for nor found the essential element necessary to support entry of judgment under the Sentencing Reform Act -- to wit, that the particular conspiracy offense to which petitioner pleaded guilty in fact continued after November 1, 1987 -- petitioner's sentence was imposed not only in violation of law, but also in disregard of all of this Court's pertinent cases. Certiorari must be granted to correct the lower courts' severe deviation from the controlling law of conspiracy, guilty pleas, and sentencing. After consideration on the merits, the case must be remanded for discretionary sentencing under pre-guidelines law.

---

conspiracy and therefore a different offense.

2. The decision below conflicts with recent rulings in two other circuits that no enhancement under USSG § 2F1.1(b)(1) for dollar "loss" should be added to the base offense level in a case involving fraud against the FDA, where no person was subjected to pecuniary losses.

Although most of the alleged objectives of petitioner's conspiracy offense involved an element of "intent to defraud," there was no fraudulent deprivation of property in this case from any "victim." See generally McNally v. United States, 483 U.S. 350 (1987) (discussing differing meanings of "fraud" in criminal law). With the exception of a few dozen patients who were given a vitamin mixture of petitioner's design that contained a minuscule amount of steroids, while being told otherwise, all the patients received just what they wanted and expected from petitioner -- prescriptions for, or injections of, ana-

bolic steroids (or Human Growth Hormone). These patients suffered no pecuniary loss.

Utilizing the "fraud" section of the United States Sentencing Guidelines, USSG § 2F1.1, the sentencing court added 8 levels for the dollar amount of "loss" under USSG § 2F1.1(b)(1) to the base offense level of 6. The Ninth Circuit affirmed without direct reference to petitioner's challenge to this enhancement. App. A8-A9. Two other Circuits, however, have recently held in cases of fraud against the FDA that no upward adjustment for "loss" is appropriate in such a case. This Court should grant certiorari to resolve that conflict.[10]

---

[10] This issue will not be reached if certiorari is granted on the first question raised and the issue is then resolved in petitioner's favor. If the writ is granted on the first issue, but

In United States v. Chatterji, 46 F.3d 1336, 1340-43 (4th Cir. 1995), the court of appeals reviewed the sentencing in a case involving the sale of generic drugs for which FDA approval had been fraudulently procured. In an opinion by Judge Wilkins, the court held that no "loss" cognizable under USSG § 2F1.1(b)(1) exists in such a case, where consumers received just what they bargained for: in that case, an effective generic equivalent to name-brand prescription drugs. Likewise, in United States v. Andersen, 45 F.3d 217, 220-23 (7th Cir. 1995), the court ruled that there was no "loss" for enhancement

---

the point is not resolved in petitioner's favor, the Court should not rely on the prudential considerations articulated in Braxton v. United States, 500 U.S. 344 (1991), to refuse to hear the second issue.

purposes under USSG § 2F1.1(b)(1) in a case of FDA fraud involving veterinarians who repackaged and sold certain drugs for unapproved and potentially dangerous human uses. As in Chatterji, the buyers knew what they were getting and wanted to get it. In both cases, the courts ruled that the unapproved nature of the drugs for the purposes for which the defendants sold them did not render them "worthless" so that all money paid to buy the drugs constituted a "loss." The decision below conflicts with those decisions.

Relying on circuit precedent, see United States v. Cambra, 933 F.2d 752, 756 (9th Cir. 1991), the district court in this case utilized the sale price, or "street value," of the drugs sold by petitioner in his practice to enhance the base offense level. App. B54. This may be a rough measure of gross gain (though

not of real or net gain), but it is in no sense a measure of any "loss."[11] Where there is a true fraudulent taking, akin to a theft, gain may serve as a surrogate measure of loss; see USSG § 2F1.1, appl. note 8; but still it is loss that the guidelines seek to measure. Gain "is not a proxy for loss when there is none." Chatterji, supra, 46 F.3d at 1340; accord, United States v. Haddock, 12 F.3d 950, 960 (10th Cir. 1993). Where, as here, there is no loss, there is to be no enhancement to the base offense under USSG § 2F1.1(b)(1). The Ninth Circuit, adhering to an erroneous position, rejected this argument where the Fourth and Seventh Circuits would have upheld

---

[11] The guidelines refer to "street value" as a measure of loss where illicit drugs are themselves stolen, USSG § 2B1.1, appl. note 5, but not otherwise.

the objection.

The Court should grant the petition for writ of certiorari to resolve this conflict in the circuits.

CONCLUSION

For each of the foregoing reasons, petitioner WALTER F. JEKOT prays that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit affirming his conviction and sentence.

Respectfully submitted,

PETER GOLDBERGER
JAMES H. FELDMAN, JR.
PAMELA A. WILK
Attorneys for Petitioner

July 6, 1995.

APPENDIX A

FILED

NOT FOR PUBLICATION

FEB 24 1995

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	NO. 93-50700
Plaintiff-Appellee,	D.C. NO. CR-91-00711-JGD
v.	
WALTER F. JEKOT, M.D.,	MEMORANDUM*
Defendant-Appellant.	

Appeal from the United States
District Court for the
Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted December 7, 1994
Pasadena, California

Before: SCHROEDER, FLETCHER and
THOMPSON, Circuit Judges.

Walter F. Jekot appeals his sentence following his guilty plea to one count of

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

conspiracy to obtain and distribute anabolic steroids and human growth hormone (HGH). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

The district court granted an evidentiary hearing on three contested issues, but denied Jekot's request for a hearing on all other contested issues. Reviewing for an abuse of discretion, Unites States v. Baker, 894 F.2d 1083 (9th Cir. 1990), we agree with the district court's conclusion that an evidentiary hearing on all issues was unnecessary. There was extensive briefing on all aspects of the sentence, and presentence report (PSR) was amended twice in response to Jekot's objections. A more extensive evidentiary hearing "would have served no purpose." Id. at 1085. The district court's ultimate findings of fact satisfied Rule 32(c)(3)(D) of the

Federal Rules of Criminal Procedure. The district court made specific findings for those issues resolved in the evidentiary hearings; otherwise, it explicitly adopted the well-reasoned and thorough second amended PSR. See United States v. Rosales, 917 F.2d 1220, 1222 (9th Cir. 1990) (Rule 32(c)(3)(D) satisfied by "adopting the conclusions in the PSR"). Moreover, Jekot has not persuaded us that any finding by the district court stemming from either the evidentiary hearing or the second amended PSR is clearly erroneous. United States v. Cambra, 933 F.2d 752, 754 (9th Cir. 1991) ("We must `accept the findings of fact of the district court unless they are clearly erroneous.'") (quoting 18 U.S.C. § 3742(e)).

The district court's finding that Jekot's conspiracy continued until

February 1991 -- the terminus of the charged conspiracy -- is not clearly erroneous. Although Jekot's plea statement admitted only to illegal conduct occurring prior to 1987, the PSR contained overwhelming evidence that Jekot continued to commit overt acts in furtherance of the conspiracy until February 1991. Accordingly, the district court did not err in applying the Sentencing Guidelines in imposing Jekot's sentence. See United States v. Kohl, 972 F.2d 294, 298 (9th Cir. 1992) (holding guidelines applicable to conspiracy that endures beyond November 1, 1987). The district court correctly calculated Jekot's sentence using the guidelines in place at sentencing. USSG §1B1.11.[1] Jekot has

---

1 All citations, unless otherwise noted, are to the United States Sentencing Commission, Guidelines Manual (Nov. 1993).

not shown any ex post facto violation, because his sentence would be the same using the guidelines in effect in February 1991.

Jekot admitted to overt acts of smuggling black market steroids prior to 1987. The district court found that Jekot distributed steroids in violation of 21 U.S.C. § 333(e) as part of the same conspiracy that continued until February 1991. [Prior to amendment filed 4/7/95, the previous sentence read, "The district court found that Jekot distributed steroids in violation of 21 U.S.C. § 333(e) and distributed HGH in violation of 21 U.S.C. § 333(f) as part of the same conspiracy that continued until February 1991."] The government may charge "certain types of fraudulent practices occur-[ing] at one period and other types at different periods" as a single conspir-

acy. Nye & Nissen v. United States, 336 U.S. 613, 617 (1949). Moreover, because Jekot committed overt acts in furtherance of the conspiracy after section 333(e) was enacted, his conspiracy was properly held to violate section 333(e) even though the statute was enacted after the inception of the conspiracy. See Rose v. United States, 149 F.2d 755, 757-58 (9th Cir. 1945). [Prior to amendment filed 4/7/95, the previous sentence read, "Moreover, because Jekot committed overt acts in furtherance of the conspiracy after sections 333(e) and (f) were enacted, his conspiracy was properly held to violate these statutes even though the statutes were enacted after the inception of the conspiracy. See Rose v. United States, 149 F.2d 755, 757-58 (9th Cir. 1945)."]

Jekot challenges almost every step the district court took in calculating his sentence. Reviewing the interpretation of the guidelines de novo and the findings of fact for clear error, Cambra, 933 F.2d at 754, we reject all of Jekot's challenges.

The district court found that Jekot conspired to violate 21 U.S.C. § 353(b) by prescribing steroids without a genuine doctor-patient relationship. Jekot argues the district court erred in interpreting section 353(b) to require a doctor-patient relationship, and thus wrongly applied the fraud guideline, USSG §2F1.1, in computing Jekot's sentence.

We do not reach, and express no opinion on, Jekot's contention that the district court improperly interpreted 21 U.S.C. §353(b) as requiring a doctor-patient relationship. The district court

properly applied §2F1.1, the fraud guideline, because Jekot pleaded guilty to a conspiracy count which included allegations of fraud. Jekot challenged the government's factual allegations at his sentencing hearing, and the district court found the factual allegations of fraud to be true. This finding is not clearly erroneous. Guideline §1B1.2(a) required the district court to apply the offense guideline section "most applicable to the offense of conviction." The district court did this when it applied §2F1.1, the fraud guideline, in sentencing Jekot.

We also conclude the district court properly used Jekot's violations of California law to calculate the dollar amount of his wrongdoing. United States v. Newbert, 952 F.2d 281, 284 (9th Cir. 1991), cert. denied, 112 S.Ct. 1702 (1992).

Furthermore, the enhancements for violating an administrative order, risking serious bodily injury, leading an extensive scheme and abusing a position of trust are all supported by the evidence and were properly applied. Although Jekot argues that he was entitled to a sentencing reduction for acceptance of responsibility, the district court's denial of the requested reduction was appropriate in light of Jekot's continual denial, despite his guilty plea, of most of the criminal conduct alleged in the charged conspiracy. [The previous sentence was added by amendment dated 4/7/95.]

Finally, we do not have jurisdiction to consider whether the district court should have departed downward. The district court recognized it had the authority to depart downward, but declined to

do so. This determination is not reviewable. United States v. Jackson, 986 F.2d 312, 314 (9th Cir. 1993).

Having reviewed the entire record of Jekot's sentencing, we find no error.

AFFIRMED.

APPENDIX B

FILED
SEP 30 1993
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY /JH/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	CASE NO.
	)	CR 91-
Plaintiff,	)	711 JGD
	)	
v.	)	SENTENCING
	)	MEMORANDUM
WALTER F. JEKOT,	)	
	)	
Defendant.	)	
	)	

On August 26, 1993, Defendant Walter F. Jekot appeared before the Court for sentencing. The Court held an evidentiary hearing at which witnesses were called and exhibits received. The Court has considered the testimony and exhibits at the evidentiary hearing, the parties' various written submissions, the presentence reports and addenda thereto, the

oral arguments of counsel, the statement of Defendant, and numerous letter submitted on his behalf. Based thereon, the Court finds as follows:

Facts

On August 14, 1991, a federal grand jury returned a twenty-eight count indictment against Defendant Walter F. Jekot ("Jekot"). The indictment charged Jekot with violating 18 U.S.C. § 371 (conspiracy); 18 U.S.C. § 545 (receipt of smuggled steroids); 21 U.S.C. § 333(e)(1) (distribution of steroids); and 18 U.S.C. § 2 (causing an act to be done). Moreover, Jekot's property was seized under 21 U.S.C. §§ 333a, 853 (forfeiture of property). On August 26, 1991, Jekot was arraigned and pleaded not guilty to the indictment.

The indictment alleged the following facts. Since 1988, doctors have been

prohibited from prescribing steroids for body building purposes. Jekot is a doctor who signed a declaration to the California Board of Medical Quality Assurance on or about February 8, 1988, on penalty of perjury, stating that he did not then and would not in future "dispense, prescribe or administer" steroids for the purpose of muscular development. Count 1 charges Jekot with conspiring to obtain and distribute anabolic steroid drugs, related compounds, and human growth hormone for his patients to use for body building purposes. Counts 2 through 23 charge Jekot with distributing steroids to various individuals for purposes other than the treatment of disease. Count 24 charges that on August 17, 1991, Jekot possessed with the intent to distribute approximately 3831 dosage units of steroids for pur-

poses other than the treatment of a disease. Counts 25 and 26 charge that Jekot distributed steroids to Barry Vorhees for purposes other than the treatment of a disease. The government sought forfeiture of his real and personal property, including an office building, a condominium residence, a car, and all property in Defendant's offices.

On June 1, 1992, Jekot pled guilty to Count One of the indictment in accordance with a plea agreement. Count One, which charges Jekot with participating in a multiple-object conspiracy in violation of 18 U.S.C. § 371, states that the principal purpose underlying the criminal conspiracy was for Jekot:

> ... to obtain steroids and other performance enhancing drugs from both legitimate and black market sources and to administer, dispense

and distribute those drugs to athletes, body builders and others, generally in cycles that involved mega doses and the stacking of steroids, for purposes of facilitating muscular and athletic development, enhancement, and appearance, and not for the treatment of a disease, all without detection by the FDA or the California Medical Board.

See Government's Response to Jekot's Objections, Exhibit 2 (Indictment), 6:10-19.

Under the plea agreement, Jekot admitted only to a limited portion of the conspiracy: that he obtained anabolic steroids and other performance enhancing drugs from "black market" sources with the assistance of other individuals not authorized to deal in the drugs. See

id., Exhibit A (Plea Agreement, Exhibit A). However, the Plea Agreement also contained the following understandings:

> Jekot understands that the district court will not be limited in setting sentence to those specific facts to which Jekot admits in his plea of guilty. Jekot agrees that he is pleading guilty to Count One of the Indictment, and agrees that the district court may consider as relevant conduct (if the court determines this is appropriate after hearing on the matter) facts pertaining to all aspects of the conspiracy as charged go the purposes of (1) determine whether the Sentencing Guidelines are applicable (2) determining the applicable sentencing guideline, and (3) determining the appropriate sentence. Jekot

also agrees that the district court may consider all relevant conduct in determining Jekot's sentence as that term is defined in Sentencing Guidelines Section 1B1.3 and 18 U.S.C. § 3661, insofar as permitted by law. Jekot reserves the right to contest, at the time of sentencing, any facts presented by the government except those contained in the attached Factual Basis, Jekot denies each and every fact other than those contained with the attached Factual Basis. In particular, Jekot denies the objectives of the conspiracy not admitted to in the attached Factual Basis.

Id., Exhibit 3 (Plea Agreement), 4:22-5:15.

On October 26, 1992, the Probation Office disclosed the presentence report

and sentencing recommendation to the Court. The Probation Officer recommended that Jekot be imprisoned for sixty months, followed by three years of supervised release, and that all fines should be waived aside from a special assessment of $50. In the sentencing recommendation, the Probation Officer stated:

> This presentence investigation was extremely difficult because it involved complex medical, ethical, and health-related issues. Additionally, the defendant and the government are diametrically opposed on almost all issues affecting sentencing in this matter. For this reason, and because the defendant pleaded to the conspiracy count which encompassed virtually all of his alleged criminal conduct, it was necessary to fully explore all sides

of this offense in order to arrive at a fair and balanced conclusions as to the facts of this case.

On December 15, 1992, Jekot filed his motion for a continuance and evidentiary hearing. On December 21, 1992, the Court granted Jekot's motion for a continuance of sentencing until March 4, 1993. On February 23, 1993, the Court filed a stipulated order continuing Jekot's sentencing until April 29, 1993. On April 26, 1993, the parties appeared before the Court for a status conference. At the status conference, the Court ordered the parties to reappear on June 2, 1993, for a status conference to discuss the scope of time necessary to resolve these issues.

On June 2, 1993, the Court granted in part and denied in part Jekot's motion for an evidentiary hearing. The Court

filed its written orders addressing the scope of the evidentiary hearing on August 12, 1993, and August 25, 1993.

Probation Office's Position

The Probation Officer recommends that Jekot be imprisoned for a term of 60 months on Count 1, with supervised release for two to three years. In addition, the fine range is between $15,000 to $1,772,840, and an additional fine sufficient to cover the cost of imprisonment, probation, or supervised release. However, it is recommended that all fines be waived in view of Jekot's inability to pay.

The Probation Officer suggests that the term of 60 months is the product of two factors, an offense level of 29, and Jekot's criminal history of I, resulting in a Guideline range of 87 to 108 months.

However, 18 U.S.C. § 371 limits the maximum term for Count 1 to 60 months.

The offense level of 29 is justified in the following manner:

(1) Jekot was involved in a scheme to defraud the government and the public concerning Jekot's distribution of anabolic steroids and human growth hormone.

Base offense level under Guideline 2F1.1(a): 6

(2) The scheme involved $887,170 worth of drugs.

Dollar value enhancement under Guideline 2F1.1(b)(1)(L): +11

(3) The scheme required more than minimum planning.

Planning enhancement under Guideline 2F1.1(b)(2)(A): +2

(4) The scheme involved violation of an administrative process.

Violation of administrative process enhancement under Guideline 2F1.1(b)(2)(B): +2

(5) Jekot's behavior involved the conscious or reckless risk of serious bodily injury.

Risk of serious injury enhancement under Guideline 2F1.1(b)(4): +2

(6) Jekot organized or led a scheme involving five or more people.

Role in offense under Guideline 3B1.1(a): +4

(7) Jekot abused his position of trust as a physician.

Abuse of position of trust under Guideline 3B1.3: +2

--

29

Guideline 5D1.2(b)(2) mandate a minimum of two years and a maximum of three year

period of supervised release.

Guideline 5E1.2 sets the fine range between $15,000 and $1,772,840. In addition, Guideline 5E1.2(i) permits the Court to levy a fine equal to Jekot's costs of imprisonment, probation, or supervised release. However, Guideline 5E1.2(f) permits the Court to waive all fines if the Court determines that Jekot is unable to pay. Although Jekot has assets totalling $367,700 and a net worth of $333,000, his present net monthly cash flow is minus $1,190. Moreover, his assets are subject to forfeiture.

Jekot's Position: Presentence Report

Jekot agrees that the presentence report is defective in five ways.

First, Jekot pled guilty to a pre-Guidelines offense in the plea agreement. As factual predicates to Count 1, Jekot admitted only to unlawful receipt of

steroids in 1985 and 1986, prior to November 1, 1987, the date the Guidelines took effect. The Probation Officer disclosed no credible evidence that Jekot engaged in a criminal conspiracy after the conduct to which he has admitted took place.

Second, nothing in the plea agreement waived Jekot's right to be free of ex post facto criminal prosecution. Jekot legally distributed anabolic steroids and human growth hormone before distribution of these substances was criminalized.

Third, Jekot's anabolic steroid treatments were proper in view of his right as a physician to prescribe anabolic steroids for appropriate medical purposes.

Fourth, the presentence report is replete with unsupported assertions and

factual errors. Among the most serious errors are these:

(1) Contrary to the report, Jekot pled guilty only to a limited conspiracy that expired in 1986.

(2) Contrary to the report, Jekot was entitled to prescribe anabolic steroids to treat a number of medical conditions, including muscle pain and insufficient production of testosterone.

(3) Contrary to the report, Jekot created a vitamin mixture for body-builders that originally contained no steroids ("GHF#1"). In 1990, Jekot added five milligrams of steroids to each unit of GHF#1 to reduce pain and fatigue. This negligible amount of steroids per dose is not proscribed by law and is a valid treatment of muscle soreness.

(4) Each of the patients to whom the presentence report states that Jekot

illegally gave steroids received GHF#1 or steroids for valid medical reasons. Jekot has not violated his statement to the California Medical Board in February 8, 1988, to refrain from dispense steroids for other than legitimate medical purposes.

(5) Jekot's medical practices and medical office operations were proper.

(6) Jekot did not intentionally store veterinary steroids in his office. Steroids found in his home were legally present. Jekot did not stock illegal steroids for use.

Fifth, Jekot cannot be charged with conspiracy to violate 21 U.S.C. § 333(e) because the government has failed to show that he agreed to conspire with anyone to violate this statute after 1986.

Assuming arguendo that the Court does not strike the entire presentence

report, Jekot argues that the Probation Officer's Guidelines calculations are defective. Because Jekot plead guilty only to conspiracy to violate 18 U.S.C. § 545, the applicable guidelines are 2Q2.1 and 2T3.2. Since Jekot pled guilty to five violations of Section 545 involving only $3,609.00, his base offense level under these guidelines is 6. None of the enhancements the Probation Officer proposes is applicable. Moreover Jekot is entitled to a two level reduction for acceptance of responsibility. Accordingly, the correct offense level is 4, proving a sentence range of zero to six months.

Government's Position

The government argues that the evidence amply supports the Probation Officer's conclusions and findings. The government contends that Jekot's objec-

tions to the presentencing report are meritless.

First, Jekot's plea agreement does not limit the scope of the conspiracy with which Jekot was charged under Count 1. See United States v. Kimball, 975 F.2d 563, 566-68 (9th Cir. 1992), cert. denied, 113 S. Ct. 1276 (1993). Although Jekot admitted only illegal predicate acts before 1987, there is ample evidence that he engaged in illegal activities after 1987:

(1) Jekot continued to buy performance enhancing drugs from black market suppliers;

(2) Jekot possessed black market steroids as late as August, 1990;

(3) Jekot illegally diverted human growth hormone from 1986 to 1988; and

(4) Jekot illegal distributed steroids from 1985 through 1991.

Second, federal law criminalized Jekot's misuse of steroids and human growth hormone throughout the relevant period. See 21 U.S.C. § 353(b)(1); 21 U.S.C. § 355(a); 18 U.S.C. § 545. These statutes proscribed the use of steroid for bodybuilding purposes and the use of "new drugs," including those obtained from foreign sources.

Third, there is ample evidence that Jekot used these drugs for unauthorized purposes.

Fourth, Jekot's assertions of factual error are unsupported. The Probation Officer found that Jekot stocked and distributed veterinary steroids, black market steroids, and human growth hormone. Jekot has failed to provide records indicating proper use of the human growth hormone, although the evidence indicates that Jekot sold as

much as $167,745 of this substance. Jekot distributed anabolic steroids to hundreds of persons. In at least two of these cases, the records indicate that the steroids were not used in a permissible manner.

Because 18 U.S.C. § 371 limits the maximum term for Count 1 to 60 months, the government need only show that Jekot's total adjusted offense level is 26, which provides for a sentencing range between 63 and 78 months. That Jekot engaged in illegal distribution of human growth hormone from 1986 through 1988 brings Jekot's case under the Sentencing Guidelines, independently of other charged activity. Jekot's case falls under Guidelines 2F1.1, the guideline concerning fraud, because (1) Jekot kept no records concerning human growth hormone, (2) Jekot continued to use

steroids for bodybuilding purposes despite his pledge in 1988 to refrain from this activity, and (3) Jekot failed to tell individuals that GHF#1 contained steroids. Under Guideline 2F1.1, Jekot's base offense level is 6.

The Probation Officer properly concluded that the monetary value of Jekot's activities is the dollar value of the drugs distributed in the course of Jekot's scheme. The evidence clearly supports a dollar value of almost $800,000. However, even if the dollar value is as little as $200,000, Jekot's offense level should be enhanced 8 levels under Guideline 2F1.1(b)(1)(I).

Jekot's activities involved more than minimal planning, violated California's administrative processes, and involved conscious risk of serious bodily injury. These factors cumulatively

enhance Jekot's offense level 6 more levels. See Guidelines 2F1.1(b)(2)(B); 2F1.1(b)(3); 2F1.1(b)(4).

Finally, Jekot organized or led a scheme involving five or more people, including his suppliers and employees, and abused his position of trust. These factors raise Jekot's offense level 6 more levels, see Guideline 3B1.1(a) & 3B1.3, resulting in a grand total of 26. Because Jekot has steadfastly denied the scope of his activities, he is not entitled to a reduction for acceptance of responsibility. Accordingly, Jekot's offense level is at least 26.

Defendant's Position: Government's Position re Presentence Report

Jekot responds that the government errs in four fundamental ways.

First, the government ignores the limited scope of Jekot's factual allega-

tion under the plea agreement, as well as the fact that the conduct with which he was charged was not criminalized until November 18, 1988.

Second, federal law does not prohibit the use of approved drugs for unapproved uses provided that prescribing doctor determined that the unapproved use is medically supported in the circumstances.

Third, Jekot is entitled to show that he had a proper medical basis to use the drugs in the manner the government alleges was illegal.

Finally, Jekot reiterates that the government's purported evidence of his illegal activities is replete with errors.

Discussion

Jekot pled guilty to Count 1 of the indictment. Count 1 alleged that from

1985 to February 28, 1991, Jekot conspired:

(1) to defraud the United States by impeding its efforts to regulate the manufacture and distribution of anabolic steroids and human growth hormone, in violation of 18 U.S.C. § 371;

(2) to fraudulently receive or distribute drugs imported in manner contrary to law, in violation of 18 U.S.C. § 545;

(3) to fraudulently deliver into interstate commerce drugs misbranded within the meaning of 21 U.S.C. § 353(b);

(4) to knowingly distribute anabolic steroids for use in humans other that the legitimate treatment of a disease, in violation of 21 U.S.C. § 333(e)(1); and

(5) to fraudulently introduce into interstate commerce unapproved drugs, in

violation of 21 U.S.C. §§ 331(d) & 333(a)(2).

Jekot's factual admissions in the plea agreement do not limit the extent of the conspiracy to which he pled guilty under Count One. See United States v. Kimball, 975 F.2d 563, 566-67 (9th Cir. 1992), cert. denied, 113 S. Ct. 1276 (1993) (sentencing court properly considered defendant's marijuana smuggling even though at time of plea defendant admitted only role as money launderer. Cf. Yates v. United States, 77 S. Ct. 1064, 1084 (1975), rev'd on other grounds, 98 S. Ct. 2141 (1978) (overt acts that establish existence of conspiracy do not define its scope). Moreover, in the plea agreement, Jekot agreed that the government could use information outside the scope of his factual admissions.

Jekot has challenged many factual claims in the original presentence report and in its addenda. However, with few exceptions, Jekot simply challenges the credibility of these claims without presenting credible evidence in support of his own position. The Court has carefully reviewed Jekot's challenges. With the exception of factual claims expressly discussed and modified infra, the Court finds that the factual claims presented in the Supplemental Addendum to the Presentence Report ("SAPR") are correct and the Court relies upon them in determining Jekot's sentence.

To determine Jekot's sentence, the Court must resolve four major issues: (1) the applicable law governing Jekot's activities; (2) the extent to which Jekot may escape criminal liability under this law by showing that he had a legitimate

medical purpose in prescribing steroids or human growth hormone; (3) the actual legitimacy of Jekot's purposes in prescribing these drugs; and (4) the correct calculation of Jekot's sentence under the Guidelines.

A. Criminal Law Governing Jekot's Conduct

The threshold issues concern the nature and scope of the law governing Jekot's activities between 1985 and 1991 involving steroids and human growth hormone, as well as Jekot's liability under these bodies of law. Three bodies of federal law are relevant to Jekot's conduct.

1. Distribution Without Prescription

a. Governing Law

Throughout the relevant period, the principal federal law governing the prescription of anabolic steroids and

human growth hormone is the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 et seq. Section 353(b)(1)(B) requires physicians to distribute under prescriptions any drug that:

> because of its toxicity or other potentially for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of an practitioner licensed by law to administer such drug.

Section 353 (b) states that such drugs:

> shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharma-

> cist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist.

Prescription drugs distributed without a proper written or oral prescription from a licenses practitioner are deemed "misbranded." Id. at § 353(b). At all relevant times, anabolic steroids and human growth hormone have been classified as prescription drugs under this provision. See In re Grand Jury Proceedings, 801 F.2d 1164, 1166 (9th Cir. 1986). The distribution of procreation drugs without a prescription is prohibited. 21 U.S.C. § 331(k). A person who violates those provision of Section 333 with intent to

defraud commits a felony and may be imprisoned up to three years. 21 U.S.C. § 333(a)(2).

Jekot argues that he cannot be charged under these laws because they expressly criminalize the distribution of prescription drugs in the absence of a prescription. The crux of the allegations against Jekot is that he prescribed steroids and human growth hormone without a valid medical purpose. However, Congress did not require that doctors prescribe steroids for a medically valid reason until 1988, and did not require that doctors prescribe human growth hormone for a medically valid reason until 1991.

The government responds that crucial to the proper prescription of drugs under Section 353(b) is (1) a genuine doctor-patient relationship and (2) the distri-

bution of drugs as part of a legitimate, individualized course of treatment. See Brown v. United Stated, 250 F.2d 745, 747 (5th Cir. 1958), cert. denied, 78 S. Ct. 1368 (1958); De Freese v. United States, 270 F.2d 730, 734 (5th Cir. 1959), cert. denied, 80 S. Ct. 810 (1960); United States v. Zwick, 413 F. Supp. 113, 115 (N.D. Ohio 1976); cf. United States v. Moore, 96 S. Ct. 335 (1975); United States v. Boettjer, 569 F.2d 1078 (9th Cir. 1978), cert. denied, 98 S. Ct. 1627 (1978). Accordingly, the issue presented is whether Jekot can be charged under Section 353(b) for dispensing prescription drugs under a nominal prescription but without a medically valid purpose.

Due process bars attempts to read into Section 353(b) requirements that the language of Section 353(b) will not reasonably support. Due process requires

that a statute must give adequate warning of the activities it prohibits and set out explicit standards for those who must apply it. Broadrick v. Oklahoma, 93 S. Ct. 2908, 2913 (1973). Criminal statutes are held to more exacting standards than civil statutes. Lester v. Falk, 751 F. Supp. 853, 855 (D. Hawaii 1990). Since Section 353(b) does not touch first amendment rights, the prohibited conduct must be apparent to a reasonable person of average intelligence. United States v. Tabacca, 924 F.2d 906, 912 (9th Cir. 1991); United States v. Fitzgerald, 882 F.2d 397, 398 (9th Cir. 1989).

In the present case, the language of Section 353(b) gives a reasonable person of average intelligence warning that a doctor prescribing anabolic steroids (1) must prescribe drugs in a written or oral manner in accordance with the express

terms of Section 353(b) and (2) must supervise the use of the drugs by the person to whom they are prescribed in a manner consistent with being a "practitioner licensed by law to administer such drug." The Court concludes that Section 353(b) requires that at minimum that a doctor prescribing steroids must bear a genuine doctor-patient relationship to the person for whom the steroids are prescribed.

By contrast, the language of Section 353(b) gives a reasonable person of average intelligence no warning that a legitimate course of treatment is an essential requirement under Section 353(b). That it is not a requirement receives additional support from the legislative intent behind Section 353(b). In United States v. Evers, 643 F.2d 1043 (5th Cir. 1981), the government sought to

prevent the defendant, Dr. Evers, from advertising that certain drugs he prescribed for circulatory problems were efficacious because the Food and Drug Administration had not approved them for this purpose. After reviewing the legislative history of the Food, Drug, and Cosmetic Act, the court stated that "while the Act was not intended to regulate the practice of medicine, it was obviously intended to control the availability of drugs for prescribing by physicians." Id. at 1084. Because Section 353(b) was not intended to regulate the medical practices of doctors, it cannot be used to punish these practices.

The government takes the contrary position, citing several cases. However, the Court has been unable to find a single reported decision in which a physician was convicted under Section

353(b) for prescribing drugs to a person with whom the doctor bore a bona fide a doctor-patient relationship in the absence of legitimate course of treatment. Moreover, the cases the government cites are unpersuasive.

Brown and De Freese concern doctors convicted under Section 353(b) for selling drugs without prescriptions within the plain meaning of Section 353(b). Although the court in Brown suggested in dicta that a prescription may exist if there is genuine doctor-patient relationship, neither the Brown nor the De Freese courts held that a doctor-patient relationship and a legitimate course of treatment are essential ingredients of a prescription under Section 353(b).

The government's reliance on Zwick, Moore, and Boettjer is misplaced for a

different reason. In each of these cases, the courts construed provisions of the Controlled Substance Act, 21 U.S.C. § 801 et seq. Although courts have held that prescriptions within the meaning of these provisions must be issued for a valid medical purpose, see e.g., Boettler [sic], 569 F.2d at 1081, the Court can find no authority that similar standards apply to prescriptions within the meaning of Section 353(b).[1]

---

1 The government also cites In re Grand Jury Proceedings, 801 F.2d 1164 (9th Cir. 1986). However, the court in this case merely observes in passing that the government sought the defendant's medical records because it believed that the defendant was guilty "both of prescribing anabolic steroids and androgenic hormones without a legitimate medical purpose and of selling them on a wholesale basis to others for dispensation without a prescription." Id. at 1166. The court did not hold that the defendant could be charged under Section 353(b) merely for prescribing steroids without a legitimate medical purpose.

Accordingly, Jekot is liable under Section 353(b) and the related provision only to the extent that (1) he distributed steroids and human growth hormone without a prescription, as defined by Section 353(b), or that (2) he prescribed these drugs in the absence of a genuine doctor-patient relationship with the persons to whom he prescribed these drugs.

b. Liability

In the present case, the Probation Officer has presented an impressive amount of evidence that throughout the relevant period, Jekot prescribed steroids and related drugs for the purposes of bodybuilding, and that Jekot sometimes sold steroids, human growth hormone, and related drugs without a prescription for this purpose. See SAPR, ¶¶ 100-187.

i. Anabolic Steroids

At the evidentiary hearing, Jekot testified that prior to February, 1988, he prescribed anabolic steroids to patients for the purpose of bodybuilding, but that he ended this practice after he signed his declaration to the California Board of Medical Quality Assurance on February 8, 1988, stating that he did not then and would not in future "dispense, prescribe or administer" steroids for the purpose of muscular development.

The government has submitted compelling evidence that throughout the relevant period, Jekot's practices with respect to the prescription of anabolic steroids fell short of those required for a genuine doctor-patient relationship. The government's expert, Dr. Gary I. Wadler ("Dr. Wadler"), stated in a declaration and testified at the evidentiary

hearing that a there is a genuine doctor-patient relationship between a doctor and a client only if the doctor follows well accepted principles, namely, the doctor monitors and manages the client's condition and keeps certain records. See Wadler Declaration, ¶¶ 22-23. Whereas Jekot adhered to these principles in the case of the clients for whom he did not prescribe steroids, he departed from them in the case of clients to whom he administered steroids. See id. at ¶¶ 23-25. Jekot failed to monitor clients receiving steroids for the appearance of serious side effects, and subsequent to February, 1987, inserted cursory diagnoses of impotence or weight loss with little attention to testing or treatment of side effects. See id. at ¶¶ 29-43. Accordingly, the Court concludes that Jekot failed to establish a genuine

doctor-patient relationship with at least some of his clients to whom he administered anabolic steroids, and that he liable under Section 353(b) for distribution of these drugs.

ii. Human Growth Hormone

There is ample evidence that throughout the relevant period, Jekot also distributed human growth hormone without a prescription within the meaning of Section 353(b). Dr. Wadler testified that the principal therapeutic use for human growth hormones is the treatment of dwarfism or stunted growth in children. See also Wadler Declaration, ¶ 13.

Jekot testified that throughout the relevant period, approximately 30 percent of his patients were children, yet that his principal reason for buying human growth hormone was to experiment with its effects on himself and others. Jekot

bought large quantities of this drug, SAPR. at ¶ 184, and sold it to individuals, id. at ¶ 186, yet his files contain no documents indicating that it was issued under prescriptions or that it was distributed to individuals to whom he bore a genuine doctor-patient relationship, id, at ¶ 185. Jekot testified that he did not keep regular medical records for those to whom he distributed human growth hormone. Moreover, Jekot often obtained the human growth hormone by holding himself out as a practicing pediatrician, id. at ¶ 437, Government's Response to Defendant's Objections, Exhibits 40-42, although he testified that he did not use the human growth hormone to treat dwarfism.

This evidence supports the conclusion that Jekot distributed human growth hormone without a prescription, in the

absence of a genuine doctor-patient relationship, and in a manner intended to defraud the FDA's efforts to regulate drug distribution. Accordingly, Jekot is liable under Section 353(b) for the distribution of this drug.

2. Specific Laws Concerning Steroids and Human Growth Hormone

a. Governing Law

In 1988, Congress enacted 21 U.S.C. §§ 333(e)(1) and 333a, banning the nonmedical use of steroids. Section 333(e)(1) provided:

> [A]ny person who distributes or possesses with the intent to distribute any anabolic steroid for any use in humans other that the treatment of disease pursuant to the order of a physician shall be imprisoned for not more than three

years or fined under title 18, United States Code, or both.

Section 333a provided:

> Any conviction for a violation of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 333(e)), or any other provision of that Act, involving an anabolic steroid or a human growth hormone shall be considered ... a conviction for a violation of title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, if such violation of the Federal Food, Drug, and Cosmetic Act is punishable by imprisonment for more than one year.

These provisions became effective on November 18, 1988, and were repealed in 1990 by legislation that became effective on February 27, 1991, the terminus of the

criminal conspiracy with which Jekot was charged in Count 1.

Under these provisions, Jekot is liable under Sections 333(e) and 333a for steroids he distributed without a valid medical purpose between November 18, 1988, and February 27, 1991. In addition, he is liable under Section 333a throughout the same period for human growth hormone he distributed with a prescription with intent to defraud.

b. Liability

In the present case, the Court has determined that Jekot fraudulently distributed human growth hormone thought the period from November 18, 1988 to February 27, 1991. Accordingly, the Court must determine whether Jekot's distribution of steroids during this period violated Sections 333(e) and 333a.

The Court has already concluded that Jekot administered anabolic steroids to clients in the absence of a genuine doctor-patient relationship. This evidence, together with other facts enumerated infra, compels the Court to conclude that after November 18, 1988, Jekot prescribed and administered anabolic steroids without a valid medical purpose.

The Probation Officer has submitted considerable evidence that after Jekot signed the declaration to the California Board of Medical Quality Assurance on February 8, 1988, stating that he would not "dispense, prescribe or administer" steroids for bodybuilding purposes, Jekot adopted the practice of keeping medical records for the patients for whom he prescribed steroids. See SAPR, ¶¶ 158-160. These records contained little

background information and usually indicated that Jekot prescribed the steroids on the basis of a perfunctory diagnosis such as "impotence," "weight loss," or the presence of inflammation. Id. In addition, Jekot administered GHF#1, a solution containing steroids, to patients during this period. Accordingly, the key issue is whether the reasons for which Jekot prescribed steroids between November 18, 1988, and February 27, 1991, constitute legitimate treatment of disease within the meaning of Section 333(e)(1).

Jekot contends that the patients to whom the Probation Officer charges that Jekot illegally gave steroids actually received GHF#1 or steroids for valid medical reasons. At the evidentiary hearing, Jekot testified that he has not violated his statement to the California

Medical Board in February 8, 1988, to refrain from dispensing steroids for other than legitimate medical purposes. Jekot testified that he believed that anabolic steroids were useful in the treatment of impotence, weight loss, and inflammation, and that many of his clients who received steroids for such alleged reasons did not fit the profile of a competitive bodybuilder. Furthermore, he testified that he added small amounts of steroids to his GHF#1 mixture for a sound medical purpose, namely, to reduce muscle soreness and fatigue, and that these amount were too small to produce a muscle enhancement effect. Jekot also testified that GHF#1 also contained human chorionic gonadotropin, a drug regulated under California law since January 1, 1987. See Section B.2 infra. Finally, he contends that he experimented

with steroids as a treatment for AIDS symptoms. See generally Supplement to Defendant's Sentencing Memorandum.

By contrast, the Probation Officer and the government contend that Jekot's claims are false. Dr. Wadler testified that there is no evidence that steroids suppress inflammation. Furthermore, he testified that there are many causes of impotence, and that steroids can be used to treat only one such cause: lack of natural testosterone. However, Jekot routinely prescribed steroids to treat impotence and weight loss without any attempt to determine the underlying cause. These facts support the conclusion that Jekot administered these drugs solely to produce muscle enhancement effect in his clients, regardless of whether these clients sought these

effects for competitive purposes or to increase personal attractiveness.

Dr. Wadler also testified that although the proportion of anabolic steroids in GHF#1 was low, the amount of GHF#1 Jekot's clients would receive in a month raised their monthly dose of anabolic steroids to near the manufacturer's recommended monthly dose, a level at which responsible physicians would supervised patients carefully for possible effects. However, Jekot often failed to tell clients that GHF#1 contained steroids. See SAPR, ¶ 416. That anabolic steroids do not suppress inflammation indicates that Jekot did not add steroids to GHF#1 for a legitimate medical purpose.

After review of the evidence presented in the parties' written submissions and at the evidentiary hearing, the

Court concludes that Jekot's prescription of steroids after November 18, 1988, did not constitute treatment of disease within the meaning of Section 333(e)(1).

3. Smuggling and Distribution of Veterinary and Unapproved Steroids

Under 21 U.S.C. §§ 355(a) and 321(p), no person may introduce into interstate commerce a drug for which a New Drug Application or Abbreviated New Drug Application is not in effect. 18 U.S.C. § 545 prohibits smuggling drugs into the United States, as well as their knowing distribution after importation.

In the present case, Jekot admitted to violations of 18 U.S.C. § 545 in the plea agreement. At the evidentiary hearing, Jekot testified that he administered veterinary and foreign-made steroids to clients. Moreover, there is considerable evidence that Jekot

purchased black market drugs from various sources. See SAPR, ¶¶ 176-82. Accordingly, Jekot distributed unapproved and veterinary steroids in violation of 21 U.S.C. §§ 355(a) and 321(p).

B. Calculation of Sentence

1. Use of Guidelines

As a threshold issue, Jekot argues that the Court should not apply the Guidelines to this case because the illegal activity to Jekot admitted in the plea agreement occurred before November 1, 1987, the date the Guidelines became effective. However, the Guidelines govern conspiracies that straddle this effective date, provided that the defendant committed over acts in aid of the conspiracy after November 1, 1987. See United States v. Kohl, 972 F.2d 294, 297-98 (9th Cir. 1992). Because Jekot committed overt acts after this date, see

Section A.2.a.i. supra, the Guidelines are properly applied to this case.

2. Term of Imprisonment

a. Fraud Guideline

Guideline 2F1.1 establishes a base offense level of six for crimes involving fraud or deceit. In the present case, Jekot pled guilty to Count 1 of the indictment, which expressly alleged that Jekot engaged in a variety of fraudulent activities. Moreover, there is ample evidence that Jekot engaged in variety or fraudulent activities, including obtaining human growth hormone through misrepresentations, see SAPR, ¶¶ 185 & 437, and failing to disclose that GHF#1 contained steroids, see id. at ¶ 416. Finally, Jekot engaged in activities intended to disguise his activities from governmental agencies, including failure to keep records concerning his distribu-

tion of human growth hormone, see id. at ¶¶ 185 & 437, signing his declaration to the California Board of Medical Assurance, and keeping bogus medical records concerning people to whom he prescribed steroids for bodybuilding purposes, see id. at ¶¶ 109-10, 158-71.

Jekot argues that the Court should apply Guidelines 2N2.1 and 2T3.2, which apply, respectively, to violations of food, drug, and cosmetic laws, and to violations of smuggling laws. However, Guidelines 2N2.1 expressly advises the Court to apply 2F1.1 when the offense involved fraud. For this reason, Guideline 2F1.1 is properly applied to this case. See United States v. Cambra, 933 F.2d 752, 754-56 (9th Cir. 1991).

i. Value of Jekot's Scheme

Guideline 2F1.1(b) provides for enhancements of the base offense level

according to the loss created by the criminal activity. The Court need not determine the loss with precision, but may make a reasonable estimate given the available information. Application Note 8 to Guideline 2F1.1(b). The Court may take into account the street value of the drugs involved in Jekot's scheme if the government is defrauded. See Cambra, 933 F.2d at 756.

In the present context, the Court may also consider the harm from violations of state law. Guideline 1B1.3 provides that in determining the base offense level, the Court should consider all uncharged acts if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. Guideline 1B1.3. In United States v. Newbert, 952 F.2d 281, 284 (9th Cir. 1991), cert. denied, 122 S. Ct. 1702

(1992), the Ninth Circuit concluded that conduct that violated state but not federal law is relevant to sentencing provided that the conduct was part of a common scheme of criminal behavior. Since January 1, 1987, California has imposed criminal liability on doctors who distribute steroids and human chorionic gonadotropin ("HCG") in the absence of a genuine doctor-patient relationship and a legitimate medical purpose. See Cal. Health & Safety Code §§ 11056 & 11379; Perzik v. Superior Court of Contra Cost County, 2 Cal. App. 4th 898, 902-03, 4 Cal. Rptr. 2d 1, 3-4 (1991). Accordingly, the harm from Jekot's violations of Sections 11056 and 11379 after January 1, 1987, is relevant for sentencing.

There is ample evidence that Jekot purchased and distributed human growth hormone with an estimated value of

$167,475 in violation of Sections 353(b) and 333a. See SAPR, ¶ 403. In addition, there is sufficient evidence that Jekot purchased and distributed black market anabolic steroids with an estimated value of $16,170 in violation of 21 U.S.C. §§ 355(a) and 321(p). See id. at ¶ 402. Finally, at the evidentiary hearing, the government provided evidence that Jekot's illegal distribution of anabolic steroids and HCG may be conservatively valued at $287,170.

After review of written submissions and oral testimony, the Court concluded that the harm due to Jekot's activities must be valued as at least $200,000. For the reasons stated infra, the Court need not reach a more precise estimate of harm. Accordingly, the base offense level is properly enhanced by eight levels under Guideline 2F1.1.(b)(I).

ii. More Than Minimal Planning and Number of Victims

Guideline 2F1.1(b)(2) provides that the Court should enhance the base offense level for a crime involving fraud if the crime involved more than minimal planning or a scheme to defraud more than one victim. Jekot's scheme to dispense prescription drugs for bodybuilding purposes lasted approximately six years. In the course of this scheme he obtained black market steroids and related drugs, dispensed human growth hormone without prescriptions, and created bogus medical records to hide the fact that he was dispensing steroids without a valid medical purpose. Because the scheme was elaborate and enduring, it required more than minimal planning. In addition, because Jekot dispensed GHF#1 to a large number of people without informing them

that it contained steroids, see SAPR, ¶ 416, Jekot's scheme had more than one victim.

Accordingly, the base offense level is properly enhanced two levels.

iii. Abuse of an Administrative Process

Guideline 2F1.1(b)(3) directs the Court to enhance the base offense level by two levels when the crime involves the abuse of an administrative process. After Jekot signed his statement to the California Medical Board in February 8, 1988, promising to refrain from dispensing steroids for other than legitimate medical purposes, Jekot continued to dispense steroids for bodybuilding purposes while creating false medical records to hide this activity. Accordingly, the base offense level is properly enhanced by two levels.

iv. Reckless Risk of Serious Bodily Injury

Guideline 2F1.1(b)(4) provides that the Court should enhance the case offense level by two levels when the offense involved the conscious or reckless risk of serious bodily injury. Jekot dispensed significant amounts of human growth hormone to others for bodybuilding purposes, despite his awareness that the use of human growth hormone can produce serious bodily injury. See SAPR, ¶¶ 278-83, 421-423. Accordingly, the base offense level is properly enhanced by two levels.

b. Role in Offense

If the defendant was an organizer or leader in any criminal activity that involves five or more participants or is otherwise extensive, the Court should enhance the offense level by four levels.

Guideline 3B1.1(a). A participant is a person "who is criminally responsible for the commission of the offense, but need not have been convicted." Id., Application Note 1. Criminal activity is "otherwise extensive" if it "used the unknowing services of many outsiders." Id., Application Note 2.

In the present case, there is sufficient evidence that Jekot's scheme involved at least five other participants within the meaning of Guideline 3B1.1(a), see SAPR, ¶ 432, and that the scheme made use of the unknowing services of many outsiders, see id. at 433. Jekot argues that he cannot be held liable under the Guidelines for a conspiracy that expired in 1986. However, Jekot has pled guilty to Count 1, and there is compelling evidence that Jekot's role in the conspiracy extended well beyond the overt

acts to which he admitted in the plea agreement. Jekot continued to cultivate sources of black market steroids, see SAPR, ¶ 125, and made extensive use of his clinic and its employees, see id. at ¶¶ 146 & 182, as well as other pharmacies and hospitals, to obtain and distribute steroids and human growth hormone, see id. at ¶¶ 102-186.

Accordingly, the base offense level is properly enhanced four levels.

c. Abuse of Position of Trust

If a defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or concealment of the offense, the court should enhance the offense level by two points. Guideline 3B1.3. The position of trust must have contributed in some

substantial way to facilitating the crime. Id., Application Note 1. The primary trait that distinguishes a person in a position of trust is the extent to which the person's position provides the freedom to commit a difficult-to-detect wrong. United States v. Pascucci, 943 F.2d 1032, 1037 (9th Cir. 1991). Doctors possess special skills within the meaning of Guideline 3B1.3. Guideline 3B1.3, Application Note 2.

In the present case, Jekot clearly used his skills and position as a doctor to obtain steroids and human growth hormone, and to disguise his illegal distribution of these drugs. Accordingly, the base offense level is properly enhanced by two levels.

d. Acceptance of Responsibility

If the defendant clearly demonstrates a recognition and affirmative

acceptance of personal responsibility for his criminal conduct, the Court should reduce the offense level by two points. Guideline 3E1.1. The Court has reviewed Jekot's explanation and justifications for his conduct, and concludes that whereas they may indicate a degree of self-deception about Jekot's intentions and purposes in obtaining and distributing medically dangerous drugs for bodybuilding purposes, they do not constitute acceptance of personal responsibility for criminal conduct. Accordingly, no adjustment is appropriate under Guideline 3E1.1.

3. Supervised Release

The Probation Officer has determined that Jekot's criminal history falls within Category I. SAPR, ¶¶ 447-48. Because Jekot's cumulative offense level is 26, Guideline 5D1.1 directs the Court

to impose a term of supervised release. The term of supervised released must be at least two years but no more than three years. Guideline 5D1.2; 18 U.S.C. §3583(b).

Jekot's minimum term of imprisonment at an offense level of 26 and criminal history category of I exceeds the statutory maximum of five years imprisonment for conspiracy. See 18 U.S.C. § 371. Accordingly, the Court imposes a three year term of supervised release.

4. Fines

Guideline 5E1.2 directs the Court to impose a fine between $12,500 and $125,000 for offenses at level 26 unless the defendant shows that he or she "is unable to pay and is not likely to become able to pay." Although Jekot has an income of approximately $6000 per month, his expenses exceed his income. SAPR,

505. Moreover, his assets are subject to liens as well as seizure by the government under civil proceedings. Id. at ¶ 507-513. Finally, imprisonment will probably terminate his ability to earn an income as a doctor. For these reasons, the Court declines to impose a fine on Jekot under Guideline 5E1.2.

A special assessment of $50 is mandatory. 18 U.S.C. § 3013.

Conclusion

The Court concludes that Jekot should be sentenced to 60 months of imprisonment. Under the Guidelines, the sentencing range for an offense level of 26 and criminal history category of I is 63 to 78 months. Because this sentencing range exceeds the statutory maximum of five years under 18 U.S.C. § 371, Jekot should be imprisoned for 60 months, pursuant to Guideline 5G1.1(a).

The offense level of 26 is justified in the following manner:

(1) Jekot was involved in a scheme to defraud the government and the public concerning Jekot's distribution of anabolic steroids and human growth hormone.

Base offense level under Guideline 2F1.1(a): 6

(2) The scheme involved more than $200,000 worth of drugs.

Dollar value enhancement under Guideline 2F1.1(b)(1)(I): +8

(3) The scheme required more than minimum planning.

Planning enhancement under Guideline 2F1.1(b)(2)(A): +2

(4) The scheme involved violation of an administrative process.

Violation of administrative process enhancement under

Guideline 2F1.1(b)(3)(B): +2

(5) Jekot's behavior involved the conscious or reckless risk of serious bodily injury.

Risk of serious injury enhancement under Guideline 2F1.1(b)(4): +2

(6) Jekot organized or led a scheme that involved five to more people or was otherwise extensive.

Role in offense under Guideline 3B1.1(a): +4

(7) Jekot abused his position of trust as a doctor.

Abuse of position of trust under Guideline 3B1.3: +2

--

26

In addition, the Court sentences Jekot to a period of supervised release of three years, and impose a special

assessment of $50, as well as such other sanctions, terms, and conditions set forth in the judgment and commitment order.

IT IS ORDERED.

Dated: _SEP 30 1993_ _/s/John G. Davies_
JOHN G. DAVIES
United States District Judge

APPENDIX C

FILED
APR 7 1995

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WALTER F. JEKOT, M.D., Defendant-Appellant.	NO. 93-50700 D.C. NO. CR-91-00711-JGD ORDER

Before: SCHROEDER, FLETCHER and THOMPSON, Circuit Judges.

The memorandum disposition filed February 24, 1995 is amended as follows:

1. At page 3, first full paragraph, the second sentence is amended to read: "The district court found that Jekot distributed steroids in violation of 21 U.S.C. § 333(e) as part of the same conspiracy that continued until February 1991."

2. At page 3, first full paragraph, the fourth sentence is amended to read: "Moreover, because Jekot committed overt acts in furtherance of the conspiracy after section 333(e) was enacted, his conspiracy was properly held to violate section 333(e) even though the statute was enacted after the inception of the conspiracy. See Rose v. United States, 149 F.2d 755, 757-58 (9th Cir. 1945)."

3. At page 4, the following sentence is added at the end of the second full paragraph (four lines from the bottom of the text): "Although Jekot argues that he was entitled to a sentencing reduction for acceptance of responsibility, the district court's denial of the requested reduction was appropriate in light of Jekot's continual denial, despite his guilty plea, of most of the

criminal conduct alleged in the charged conspiracy."

The panel has voted to deny the petition for rehearing. The full court has been advised of the suggestions for rehearing en banc and no active judge has requested a vote thereon. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

FILED
MAY -8 1995
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	NO. 93-50700
Plaintiff-Appellee,	
v.	D.C. NO. CR-91-00711-JGD
WALTER F. JEKOT, M.D.,	
Defendant-Appellant.	ORDER

THOMPSON, Circuit Judge:

The defendant-appellant's motion to stay or recall the mandate is denied.

Supreme Court, U.S.
FILED
SEP 11 1995
CLERK

No. 95-39

In the Supreme Court of the United States

OCTOBER TERM, 1995

WALTER F. JEKOT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

JAMES E. ARNOLD
DOUGLAS LETTER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court clearly erred in determining that the conspiracy to which petitioner pleaded guilty continued after November 1, 1987.

2. Whether the district court erred in increasing petitioner's base offense level pursuant to Sentencing Guidelines § 2F1.1(b)(1) to account for the dollar value of the prescription drugs that petitioner unlawfully distributed.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Blumenthal v. *United States*, 332 U.S. 539 (1947)	8
Braxton v. *United States*, 500 U.S. 344 (1991)	11
United States v. *Andersen*, 45 F.3d 217 (7th Cir. 1995)	9, 10
United States v. *Cambra*, 933 F.2d 752 (9th Cir. 1991)	6
United States v. *Chatterji*, 46 F.3d 1336 (4th Cir. 1995)	9, 10
United States v. *Dale*, 991 F.2d 819 (D.C. Cir.), cert. denied, 114 S. Ct. 286 (1993)	7, 8
United States v. *Morgano*, 39 F.3d 1358 (7th Cir. 1994), cert. denied, 115 S. Ct. 2559 (1995)	7, 8
United States v. *Underwood*, 932 F.2d 1049 (2d Cir.), cert. denied, 502 U.S. 942 (1991)	8

Statutes and regulations:

18 U.S.C. 371	2
28 U.S.C. 994(*o*)	11
28 U.S.C. 994(u)	11
Sentencing Guidelines:	
§ 2F1.1	7
§ 2F1.1(b)(1)	6, 9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-39

WALTER F. JEKOT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10, C1-C3) is unpublished, but the judgment is noted at 47 F.3d 1176 (Table). The opinion of the district court (Pet. App. B1-B68) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1995, and its opinion was amended on April 7, 1995. A petition for rehearing was denied on April 7, 1995. Pet. App. C3. The petition for a writ of certiorari was filed on July 6, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Central District of California, petitioner was convicted of one count of conspiring to obtain and illegally distribute anabolic steroids, human growth hormone, and other prescription drugs, in violation of 18 U.S.C. 371. He was sentenced to 60 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. A1-A10.

1. Petitioner was a licensed physician in the State of California. Between 1985 and 1991, he used his medical license to purchase prescription drugs such as anabolic steroids and human growth hormone, as well as other drugs believed to enhance athletic performance. Petitioner obtained some of the drugs from legitimate sources such as pharmacies and licensed drug wholesalers. He also made illegal purchases of anabolic steroids and human growth hormone from a variety of black market sources. Then, through his medical practice, petitioner illegally distributed and administered those drugs (which included smuggled steroids and steroids approved only for use in animals) to bodybuilders and athletes. See generally Presentence Report (PSR) ¶¶ 100-183.

In late 1987, petitioner's distribution of anabolic steroids came under the scrutiny of the California Medical Board. Petitioner settled that investigation by submitting to the Board a sworn statement in which he agreed not to "dispense, prescribe or administer anabolic steroids for the purpose of muscular development or enhancement unless, at some future time, anabolic steroids gain general acceptance in the Los Angeles medical community for such pur-

poses." PSR ¶¶ 104-110. Even after signing that declaration, however, petitioner continued to use his medical practice to distribute anabolic steroids and prescription scrips for bodybuilding purposes. He attempted to evade detection by, *inter alia*, creating false medical records and listing false diagnoses. See PSR ¶¶ 158-160. Petitioner also created a concoction called GHF #1, which he advertised as being a "non-steroid" program for bodybuilders, but which in fact contained anabolic steroids. See PSR ¶¶ 161-168.

2. a. The charge to which petitioner pleaded guilty (Count 1 of the Indictment) alleged that petitioner had participated in a conspiracy whose purpose was

> to enable the [petitioner], in the course of his business and for profit, to obtain steroids and other performance enhancing drugs from both legitimate and black market sources and to administer, dispense and distribute these drugs to athletes, body builders and others * * * for purposes of facilitating muscular and athletic development, enhancement, and appearance, and not for the treatment of a disease, all without detection by the FDA or the California Medical Board.

PSR ¶ 17; Pet. App. B4-B5. Petitioner pleaded guilty to Count 1 pursuant to a written plea agreement. He made only limited factual admissions designed to support the entry of his plea. *Id.* at B5. He admitted to participating in a conspiracy "to enable [petitioner] to obtain anabolic steroids and other performance enhancing drugs from both legitimate and black market sources." Gov't C.A. Br. 4. Petitioner further admitted to obtaining the assistance of others not authorized to deal in prescription drugs for the

purpose of purchasing "black market" anabolic steroids and other performance-enhancing drugs. Petitioner acknowledged that his conduct was designed to defraud the Food and Drug Administration (FDA) and to facilitate his receipt and sale of smuggled drugs. PSR ¶ 51; Gov't C.A. Br. 4-5.

Petitioner denied all other factual allegations in Count 1.[1] He acknowledged, however, that his limited admissions would not restrict the district court's consideration at sentencing of the entirety of his illegal conduct. Thus, the plea agreement provided that

> [petitioner] understands that the district court will not be limited in setting sentence to those specific facts to which [petitioner] admits in his plea of guilty. [Petitioner] agrees that he is pleading guilty to Count One of the Indictment, and agrees that the district court may consider as relevant conduct (if the court determines this is appropriate after hearing on the matter) facts pertaining to all aspects of the conspiracy as charged for the purposes of (1) determining whether the Sentencing Guidelines are applicable, (2) determining the applicable sentencing guideline, and (3) determining the appropriate sentence. * * *

Pet. App. B6; Gov't C.A. Br. 5.

b. The Probation Office conducted a lengthy presentence investigation, culminating in a 108-page presentence report. That report detailed how peti-

---

[1] Petitioner also denied those objectives of the conspiracy that he did not admit in his written factual basis—*i.e.*, the objects relating to the distribution of misbranded prescription drugs; the distribution of steroids for reasons other than the treatment of a disease; and the distribution of unapproved new drugs received from black market sources. Pet. App. B7.

tioner, with the assistance of others, had for years been using his medical license as a cover for the illegal purchase and distribution of anabolic steroids, human growth hormone, and other performance-enhancing drugs. Gov't C.A. Br. 6-9. After petitioner filed numerous objections, the United States submitted detailed factual materials organized to correspond with, and provide a factual basis for, each paragraph of the presentence report. The district court then conducted three days of evidentiary hearings. Gov't C.A. Br. 9-11.

The district court subsequently issued a written opinion adopting the material findings contained in the presentence report. The court found that petitioner, under the guise of operating a medical practice, had engaged in a conspiracy to obtain and distribute anabolic steroids, human growth hormone, veterinary steroids, and smuggled steroids over a period of several years. The district court rejected petitioner's argument that the Sentencing Guidelines did not apply to his conduct. The court determined that "there is compelling evidence that [petitioner's] role in the conspiracy extended well beyond the overt acts to which he admitted in the plea agreement," Pet. App. B60-B61, and explained that "the Guidelines govern conspiracies that straddle [the November 1, 1987] effective date [of the Guidelines], provided that the defendant committed overt acts in aid of the conspiracy after November 1, 1987. Because [petitioner] committed overt acts after this date, the Guidelines are properly applied to this case." *Id.* at B51-B52 (citations omitted).

The district court also concluded that petitioner had "engaged in [a] variety o[f] fraudulent activities, including obtaining human growth hormone through

misrepresentations * * * and failing to disclose that GHF#1 contained steroids." Pet. App. B52. The court found that petitioner had taken numerous steps to evade detection by government agencies. Among other things, the district court concluded, petitioner had "created bogus medical records to hide the fact that he was dispensing steroids without a valid medical purpose." *Id.* at B57; see also *id.* at B52-B53.

Guidelines § 2F1.1(b)(1) provides that in sentencing for fraud offenses, the district court should increase the defendant's offense level to reflect the monetary loss caused by the fraudulent activity. Pet. App. B53. Relying on governing Ninth Circuit precedent, the court held that in cases involving fraud against government enforcement agencies, the "street value of the drugs involved" could properly be considered in applying Guidelines § 2F1.1(b)(1). Pet. App. B54 (citing *United States* v. *Cambra*, 933 F.2d 752, 756 (9th Cir. 1991)). The court found that the monetary value of the drugs illegally distributed was in excess of $200,000, and on that basis it increased petitioner's offense level by eight levels. Pet. App. B56.[2]

3. The court of appeals affirmed. Pet. App. A1-A10. The court first upheld the district court's decision to apply the Sentencing Guidelines, explaining that "[t]he district court's finding that [petitioner's] conspiracy continued until February 1991 * * * is not clearly erroneous. Although [petitioner's] plea statement admitted only to illegal conduct occurring prior to 1987, the PSR contained overwhelming evidence that [petitioner] continued to commit overt acts in

---

[2] The presentence report had estimated that value as being in excess of $880,000, and had recommended an enhancement of 11 levels. See Pet. App. B11.

furtherance of the conspiracy until February 1991." *Id.* at A3-A4. The court of appeals also rejected petitioner's challenges to the manner in which the Guidelines had been applied. *Id.* at A7. The court noted, *inter alia*, that "[t]he district court properly applied § 2F1.1, the fraud guideline, because [petitioner] pleaded guilty to a conspiracy count which included allegations of fraud. [Petitioner] challenged the government's factual allegations at his sentencing hearing, and the district court found the factual allegations of fraud to be true. This finding is not clearly erroneous." *Id.* at A7-A8.

ARGUMENT

1. Petitioner contends (Pet. 20-34) that the district court erred in sentencing him under the Sentencing Guidelines because it failed to make a factual finding that the conspiracy to which he pleaded guilty continued after the November 1, 1987, effective date of the Guidelines. That factbound claim is incorrect, raises an issue of no continuing importance, and does not warrant this Court's review.

As petitioner acknowledges (Pet. 23, 32-33), the Sentencing Guidelines are applicable to conspiracies that began before November 1, 1987, but continued after that date. See, *e.g.*, *United States* v. *Morgano*, 39 F.3d 1358, 1369 (7th Cir. 1994), cert. denied, 115 S. Ct. 2559 (1995); *United States* v. *Dale*, 991 F.2d 819, 853-854 (D.C. Cir.) (citing cases), cert. denied, 114 S. Ct. 286 (1993). The court of appeals upheld the district court's decision to apply the Guidelines, explaining that "[t]he district court's finding that [petitioner's] conspiracy continued until February 1991 * * * is not clearly erroneous." Pet. App. A3-A4. Petitioner argues that in fact the district court

made no such finding. In petitioner's view (see Pet. 23, 30-32), the district court found only that his *unlawful conduct* continued after November 1, 1987—not that the *conspiracy* extended past that date. That argument is without merit.

In holding that petitioner's offense was governed by the Sentencing Guidelines, the district court explained that "the Guidelines govern conspiracies that straddle [the November 1, 1987] effective date [of the Guidelines], provided that the defendant committed overt acts in aid of the conspiracy after November 1, 1987. Because [petitioner] committed overt acts after this date, the Guidelines are properly applied to this case." Pet. App. B51-B52 (citations omitted). The court thus clearly recognized that application of the Guidelines was appropriate only if the conspiracy remained in existence after November 1, 1987; viewed in context, its finding that petitioner "committed overt acts after this date" can only be regarded as a finding that petitioner committed overt acts in furtherance of a continuing conspiracy.

Questions concerning a conspiracy's duration and scope are highly fact-based. See *Blumenthal* v. *United States*, 332 U.S. 539, 554-559 (1947). When the applicability of the Sentencing Guidelines depends upon the resolution of such questions, the courts of appeals uniformly agree that the pertinent factual determination is to be made by the district court and reviewed under a clearly erroneous standard. See, *e.g.*, *Morgano*, 39 F.3d at 1369-1371; *Dale*, 991 F.2d at 854; *United States* v. *Underwood*, 932 F.2d 1049, 1053-55 (2d Cir.), cert. denied, 502 U.S. 942 (1991). Noting that "the PSR contained overwhelming evidence that [petitioner] continued to commit overt acts in furtherance of the conspiracy until February 1991," Pet.

App. A4, the court of appeals correctly declined to disturb the district court's decision to apply the Guidelines.[3] That factbound holding does not warrant this Court's review.

2. Petitioner contends (Pet. 35-40) that the district court's decision to increase his base offense level pursuant to Guidelines § 2F1.1(b)(1) was improper because "in cases of fraud against the FDA * * * no upward adjustment for 'loss' is appropriate." Pet. 36. Petitioner relies (see Pet. 37) on *United States* v. *Chatterji*, 46 F.3d 1336 (4th Cir. 1995), and *United States* v. *Andersen*, 45 F.3d 217 (7th Cir. 1995). In those cases the courts of appeals held that, absent actual or intended pecuniary injury to consumers, competitors, or the government, there could be no "loss" justifying application of Guidelines § 2F1.1-(b)(1). Petitioner's claim does not warrant further review.

Even under the approach employed in *Chatterji* and *Andersen*, Guidelines § 2F1.1(b)(1) would be applicable on the facts of this case. Unlike those cases, in

---

[3] The district court's determination that the conspiracy extended past November 1, 1987, was amply supported by the record. Pursuant to the plea agreement, petitioner admitted that "in [agreeing] with other individuals to provide him with black market steroids and other performance enhancing drugs, [petitioner] was engaged in a conspiracy to commit various federal crimes." PSR ¶ 51. Although petitioner's admissions concerning the receipt of black market steroids were limited to conduct occurring before November 1, 1987, see PSR ¶¶ 52-53, the Probation Office concluded that those activities continued after that date. See PSR ¶ 177 ("From approximately June 1988 through approximately June 1989, Barry Voorhees * * * admitted to selling [petitioner] black market steroids * * * "), PSR ¶ 181 (noting that black market steroids were recovered during an August 1990 search of petitioner's home).

which the sole harm proved was impairment of the government's regulatory efforts, the present case involves deception of individual consumers and consequent pecuniary injury to them. The district court found that petitioner's fraudulent conduct included "failing to disclose [to consumers] that GHF#1 contained steroids." Pet. App. B52; see also *id.* at B57-B58 ("because [petitioner] dispensed GHF#1 to a large number of people without informing them that it contained steroids, [petitioner's] scheme had more than one victim") (citation omitted). That finding would justify application of Guidelines § 2F1.1(b)(1) even under the standard employed by the Fourth and Seventh Circuits. Compare *Chatterji*, 46 F.3d at 1342 ("We have little doubt that economic loss would exist" where "a drug with fraudulently-obtained FDA approval harms consumers, fails to produce its intended effects, or is something less than it is represented to be."); cf. *Andersen*, 45 F.3d at 221 (Guidelines § 2F1.1(b)(1) inapplicable where defendant's "customers appear to have been well aware that the drugs they were purchasing were not approved by the FDA").[4] Whether or not the full extent of the loss enhancement imposed on petitioner could be sustained

---

[4] Petitioner admitted that he gave approximately 100 individuals injections of the GHF #1 concoction without disclosing to them that the advertised "NON-STEROID" concoction actually contained anabolic steroids. PSR ¶ 209. Those unwitting individuals actually received monthly dosages of steroids in their GHF #1 injections that approached "the manufacturer's recommended monthly dose, a level at which responsible physicians would supervised [*sic*] patients carefully for possible effects." Pet. App. B49. Petitioner failed to provide such monitoring, however, thereby placing those individuals' health at risk. *Id.* at B39, B41, B49, B59.

on that basis is not a question worthy of this Court's review.

In any event, as this Court recognized in *Braxton* v. *United States*, 500 U.S. 344, 348 (1991), the United States Sentencing Commission is charged by statute with the duty "periodically [to] review and revise" the Guidelines, 28 U.S.C. 994(*o*), and has power to determine whether and to what extent its amendments will have retroactive effect, 28 U.S.C. 994(u). Any conflict in approach between the decision in this case and those in *Chatterji* and *Andersen* is for the Sentencing Commission to resolve.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

JAMES E. ARNOLD
DOUGLAS LETTER
Attorneys

SEPTEMBER 1995